In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 327

EMPRESA SIDERURGICA, S. A., a corporation of Colombia, South America, and VANDERBURGH & CO., INC., a California corporation,

Appellants,

vs.

COUNTY OF MERCED, a municipal corporation, J. EMMETT MCNAMARA, Assessor of the County of Merced, et al.,

Appellees.

APPELLANTS' OPENING BRIEF.

SCOTT D. KELLOGG,
1012 East Fourteenth Street, Oakland 6, California,
Counsel for Appellants.

Subject Index

Page

References to the official report of the opinion of the Supreme Court of the State of California 1

Statement of the grounds upon which the jurisdiction of this court is invoked 2

Statement of the case 7

Specifications of the assigned errors intended to be urged by appellants 15

Summary of argument 23

The court below erred in deciding that no exportation of the cement plant commenced until after delivery of the cement plant to the railroad common carrier (Assignments of Error 1-20; R. 127-133) 23

Argument 25

The California Supreme Court erred in its decision that no exportation of the cement plant commenced until after delivery of the cement plant to the railroad common carrier 27

Conclusion 62

Table of Authorities Cited

Cases	Pages
A. G. Spalding & Bros. v. Edwards, 262 U. S. 66	7, 48, 50, 51, 52
Carson Petroleum Company v. Vial, 279 U. S. 95	56, 62
Chicago, etc., Co. v. Perry, 259 U. S. 548	6
Clarke & Co. v. Clarke (C.C. Ga.), 3 Woods, 408, Federal Cases No. 2846, p. 943	38
Coe v. Errol, 116 U. S. 517	31, 34, 35, 36, 37, 58
Cornell v. Coyne, 192 U. S. 418	41
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	6, 60, 61
Empresa Siderurgica, S. A. v. County of Merced, 194 P. (2d) 527	5
Fairbanks v. United States, 181 U. S. 283	39
First National Bank v. Anderson, 269 U. S. 341	6
Hooven & Allison Co. v. Evatt, 324 U. S. 652	7, 61
Hughes Bros. Timber Co. v. Minnesota, 272 U. S. 469	59, 60
In re Globe Varnish Company (C.C.A.), 114 F. (2d) 916	62
Joseph v. Carter & Weekes S. Co., 330 U. S. 422	41
Market Street Railway Company v. Railroad Commission, 324 U. S. 548	5
Multnomah County v. Dant & Russell, Inc., 158 Ore. 350, 75 P. (2d) 986	60
N. Y. and Cuba Mail S.S. Co. v. United States (D.C., N.Y.), 125 Fed. 320	39
Nickey v. State of Mississippi, 292 U. S. 393	6
Puget Sound Stevedore Co. v. Tax Commission, 302 U. S. 90	40, 41
Railroad Commission v. Worthington, 225 U.S. 101	56
Richfield Oil Corp. v. State Board, 329 U.S. 69	7, 44, 47

Pages

Standard Oil Company v. Johnson, 316 U.S. 481 6
State of Texas v. Anderson, Clayton & Co., 92 Fed. (2d) 104 60
Sully v. American National Bank, 178 U.S. 289 6

Thames & Mersey Insurance Company v. United States, 237 U.S. 19 39
The Daniel Ball, 10 Wall. 557 35

United States v. County of Allegheny, 322 U.S. 174 6
United States v. Hvoslef, 237 U.S. 1 39

Western Oil Refining Company v. Lipscomb, 244 U.S. 346 ..... 56, 57
Whitfield v. Ohio, 297 U.S. 431 6
Willcuts v. Bunn, 282 U.S. 216 39

York Mfg. Co. v. Colley, 247 U.S. 21 29

Statutes

California Revenue and Taxation Code:
Division 1 ..... 2, 7, 15, 16
Section 6352 58

Judicial Code, Section 237 6

United States Constitution, Article I, Section 10, Clause 2 ..... 2, 15, 16, 22, 23, 25, 38

Miscellaneous

California Rules on Appeal, Rule 24 5

Webster's New International Dictionary, Second Edition, Unabridged, 1944 47

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 327

EMPRESA SIDERURGICA, S. A., a corporation of Colombia, South America, and VANDERBURGH & CO., INC., a California corporation,

Appellants,

vs.

COUNTY OF MERCED, a municipal corporation, J. EMMETT MCNAMARA, Assessor of the County of Merced, et al.,

Appellees.

APPELLANTS' OPENING BRIEF.

REFERENCES TO THE OFFICIAL REPORT OF THE OPINION OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

The decision of the Supreme Court of California has not been officially reported at the time of writing

this brief. It is unofficially reported in 32 A.C. 95, 194 P. (2d) 527, and is found in the record at pages 104 to 109.

STATEMENT OF THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The suit was instituted by appellants to recover a tax which the appellees had levied upon a complete cement manufacturing plant, said tax, after assessment, being reduced purportedly to cover only the portion of the plant remaining in the county on tax day. (March 5, 1945.) The cement plant was sold to Appellant Empresa Siderurgica, S. A., a corporation of Colombia, South America, for exportation to Medellin, Colombia, which plant was so exported. (Compl. VIII-XIII, R. 4-6.) All averments of the complaint, other than that the property assessed was in interstate or foreign commerce and was an export, were admitted by the answer. (R. 13-15.)

The tax was levied under and by virtue of the California Revenue and Taxation Code, Division 1, entitled "Property Taxation", enacted 1939, as amended and in effect on March 5, 1945. The applicable sections of the code in force at the time of the levy are attached as an appendix to this brief. Concisely, the statute provided for an annual assessment of property in the county to the owner on the first Monday in March, and Section 202 specifically exempted the property upon which a tax was prohibited either by the Constitution of the United States or of California.

The complaint in the trial Court, in addition to incorporating the protest filed at the time the tax was paid under protest (in which appellants asserted that the California Statute if construed, applied or enforced in such manner as to impose a tax on the said cement plant was in contravention of the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States, R. 4-5), directly averred in paragraph XI:

> "That the said tax was and is an unlawful tax on the personal property of Plaintiffs and was illegally levied and placed upon the tax roll of the said County of Merced under color of law therefor. That the imposition of the said personal property tax is an unlawful tax on the following grounds:
>
> "(1) That the property assessed by this said personal property tax and for which payment under protest was made as aforesaid, was at the time of the assessment of this tax and ever since has been an export and as such was and is exempt from taxation by the State of California and/or the County of Merced under the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States, which prohibits taxation of exports by the states, and the said property was not properly subject to taxation by the State of California and/or the County of Merced under Article XIII, Section 1 of the Constitution of the State of California and Section 202 of the Revenue and Taxation Code of the State of California.
>
> "(2) That the property assessed by this personal property tax and for which payment under

protest was made, as aforesaid, was at the time of assessment of this tax in the hands of a common carrier and was and is property or commodities entered and moving in the course of transportation in foreign commerce, and as such, was and is exempt from taxation by the State of California and/or the County of Merced under the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States and under Article XIII, Section 1 of the Constitution of the State of California, and Section 202 of the Revenue and Taxation Code of the State of California; and that such taxation constituted and does constitute an interference with goods entered and moving in the course of foreign commerce." (R. 5.)

Precisely the same charge was made in the protest. (R. 8-9.)

The Trial Court reached the conclusion (R. 98):

"That on March 5, 1945, the cement plant and the parts thereof were so definitely committed to exportation and had advanced so far in the execution of a planned and finally accomplished exportation that its taxation was prohibited by Article I, Section 10, Clause 2 of the Constitution of the United States." (R. 98, Conclusions of Law II.)

Judgment was entered for the appellants. (R. 96.)

The appellees, County of Merced, et al., appealed to the California Supreme Court and the judgment appealed from was reversed on June 15, 1948. (194 P.

(2d) 527; R. 104-109.) In its final decision, the California Supreme Court said:

> "Article I, Section 10, Clause 2, of the Constitution of the United States provides: 'No State shall without the Consent of the Congress, lay any imposts or duties on Imports or Exports * * *.' The trial judge determined, as a matter of law, that when the goods have been committed to exportation, a tax imposed upon them amounts to taxation of an export." (R. 106.)
>
> "The property owner's argument that because 12% of the plant had been shipped out of the county and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained." (R. 108.)
>
> *Empresa Siderurgica, S. A. v. County of Merced*, 194 P. (2d) 527, 529, 530.

On July 8, 1948, a rehearing was denied, and the California Supreme Court thereafter had no power to review or modify its decision. See:

California Rules on Appeal, Rule 24;

Market Street Railway Company v. Railroad Commission, 324 U. S. 548.

An appeal to this Court was duly allowed by the Acting Chief Justice of the Supreme Court of the State of California on August 19, 1948. (R. 133-134.)

Since both in the complaint and in its protest appellants asserted that the personal property tax, if construed, applied or enforced so as to impose a tax on the said cement plant, was in contravention of the

Constitution of the United States, this Court under Section 237 of the Judicial Code has jurisdiction of the appeal. See:

Standard Oil Company v. Johnson, 316 U. S. 481, 482-3;

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 289;

First National Bank v. Anderson, 269 U. S. 341, 345-6;

United States v. County of Allegheny, 322 U. S. 174, 192.

Such jurisdiction of the appeal also attaches because it appears from the face of the opinion of the Court below that the constitutionality of the statute as construed and applied was involved and considered by it. See:

Chicago, etc., Co. v. Perry, 259 U. S. 548, 551;

Sully v. American National Bank, 178 U. S. 289, 298;

Nickey v. State of Mississippi, 292 U. S. 393, 394;

Whitfield v. Ohio, 297 U. S. 431, 435-6.

Appellees, in their Statement in Opposition to Jurisdiction assert on page 1 that no substantial federal question is presented. The answer is that the California Supreme Court in its final decision construed the statute as not exempting a portion of an entire export because that portion had not yet been delivered to a railroad common carrier, and this decision presents the constitutional question as to whether the

statute as so construed, enforced and applied, is repugnant to the Federal Constitution. See:

Richfield Oil Corp. v. State Board, 329 U. S. 69, 83;

Spalding & Bros. v. Edwards, 262 U. S. 66, 69-70;

Hooven & Allison Co. v. Evatt, 324 U. S. 652, 662-663.

Brief which we were permitted to file in answer to the Statement in Opposition to Jurisdiction (hereafter for brevity referred to as "our brief"), pp. 2-5, where the point is more fully discussed and pertinent portions of the above cited decisions quoted.

STATEMENT OF THE CASE

As heretofore indicated in the discussion of the jurisdiction, the action was one to recover a personal property tax levied by the appellees under the California Revenue and Taxation Code, Division 1. The property or article sold to Appellant Empresa Siderurgica, the foreign purchaser, was an entire, complete and operating cement manufacturing plant. After title had passed from the domestic seller to the foreign purchaser, after the export forwarding agent and the contractor-common carrier had taken possession and the cement plant was in the process of being dismantled, packaged and shipped, and after 14 carloads (12% of the entire plant) had left Merced County on

its way to Medellin, Colombia, South America, the assessor of said county assessed a personal property tax on the whole of the cement plant. Thereafter, when it was pointed out that 14 carloads were not within the jurisdiction of Merced County, the assessor appeared before the Board of Supervisors and had the tax reduced by 12%. This reduced tax was paid by appellants under protest and is the tax sought to be recovered in this case.

All the material facts are set out in the formal averments of the complaint (R. 1-6) and in the protest attached to the complaint as Exhibit "A" (R. 6-13), and they are admitted by the answer (R. 13-15.)

The case was submitted upon a stipulation and agreed statement of facts to which certain documents were attached and incorporated by reference, the parties offering no other evidence. (R. 97.) The stipulation is found in the record, pages 17-87. Although unnecessary, because no issue of fact was presented by the pleading or proof, formal findings of fact and conclusions of law were made by the Court (R. 97-99), the first finding being that the facts are as stated in said stipulation and agreed statement of facts. (R. 97.) As there was no challenge of the accuracy of that finding by the California Supreme Court, we will take the facts from said stipulation except as otherwise indicated. Concisely, they are:

Appellant, Empresa Siderurgica, S. A. is a corporation duly organized and existing under the laws of

Colombia, South America, having its principal place of business at Medellin, Colombia (R. 18), and will be hereafter referred to as "foreign purchaser". Appellant Vanderburgh & Co., Inc., is a California corporation and an export forwarding agent (R. 18), and will be hereafter referred to as "export forwarding agent".

Prior to November 11, 1944, negotiations were entered into between the foreign purchaser and Henry J. Kaiser Company, hereinafter referred to as "domestic seller", for the purchase of the Yosemite Portland Cement Plant located in Merced County, California. (R. 18.)

Thereafter on November 11, 1944, the domestic seller entered into a written contract for the sale of the Yosemite Portland Cement Plant to the foreign purchaser. (R. 18.) The cement plant sold under the contract was an entire, complete and operating cement plant. It included the quarry machinery, some of which was located at the plant site and some was located at the quarry, spare parts, laboratory equipment and all necessary items which are required in the operation of a cement plant, in addition to the cement plant itself. (R. 23.) In the contract of sale, the domestic seller made this representation and warranty: "Seller represents that said cement plant was being operated until July 1, 1944, that Seller purchased said cement plant from its former operator in operating condition as of that time, and Seller warrants that it has not thereafter sold or removed any

equipment or property from said cement plant except that listed in 'Exhibit B', attached hereto." (R. 25.) (Exhibit "B" contained items not necessary for the operation of the cement plant and property not owned by seller but located at the plant site, such as railroad tracks owned by Santa Fe Railroad and transmission lines owned by Pacific Gas & Electric.)

The purchase price of the entire cement plant was $555,000.00. (R. 27.)

Title to the foreign purchaser was to pass pursuant to the contract upon the occurrence of the following two conditions:

(a) The issuance of an export license by the U. S. Foreign Economic Administration, and

(b) The establishment of a letter of credit in payment for the entire cement plant. (R. 26-27.)

The contract also provided that upon the passage of title to the foreign purchaser, an export forwarding agent was to take delivery to ship the entire plant to the foreign purchaser in the Republic of Colombia. (R. 26-27.)

On December 2, 1944, appellant Vanderburgh & Co. was designated as the export forwarding agent in place of the export forwarding agent originally named in the contract of sale; and on the same date, the export forwarding agent entered into a written contract with the Bigge Drayage Company, a contractor and a common carrier by motor vehicle duly licensed by the Interstate Commerce Commission (hereinafter

referred to as contractor-common carrier) to dismantle the said cement plant; disassemble the equipment, and deliver the entire cement plant to the Atchison, Topeka and Santa Fe Railway Co. at the plant site for transportation by rail to the port of embarkation. (R. 18-19.) The Atchison, Topeka and Santa Fe Railway Co. will be hereinafter referred to as the railroad common carrier.

The contract with the contractor-common carrier set forth in detail the manner in which the plant would be dismantled in order that it could be reassembled at its destination.

For example, the contract represented and required that the foreign purchaser had employed a firm of consulting engineers to perform services in connection with the dismantling of the cement plant (R. 32); at least one photograph was to be taken of each machine or piece of equipment before and after dismantling, such photographs to be numbered and bear the same identification marks as the parts of which they were taken and filed so as to be readily accessible to persons reassembling the plant (R. 33); all separations to be made at point of joinder and permitted no cutting or disassembling of any part which would weaken the structure or parts when they are reassembled (R. 35); and the parts to be matchmarked in accordance with a method approved by the consulting engineers. (R. 37.)

The contractor-common carrier was an independent contractor in the performance of its contract with the export forwarding agent. (R. 41-42.)

The contract with the contractor-common carrier was to become effective upon the occurrence of the last of the following three conditions:

(a) The approval of the contract by the foreign purchaser.

(b) The issuance of an export license by the Foreign Economic Administration permitting the export of the cement plant.

(c) Notice approved by domestic seller that foreign purchaser had acquired title and export forwarding agent was entitled to possession. (R. 32.)

The export forwarding agent was obligated to pay to the contractor-common carrier for the performance of the contract the sum of $120,000.00. (R. 38.)

On December 15, 1944, the Foreign Economic Administration in Washington, D. C., issued Export License SP 2086 permitting the exportation of the entire cement plant from the United States to Colombia. (R. 20.) The license set forth that the articles and materials set forth on the schedules attached "constitute the total known requirements for this cement manufacturing plant". (R. 63.)

On January 3, 1945, a letter of credit covering the balance of the purchase price was deposited with the bank in favor of the domestic seller by the foreign purchaser. (R. 20-21.)

On the same day, January 3, 1945, the export forwarding agent delivered to the contractor-common carrier a letter approved by the domestic seller as fol-

> "In accordance with Paragraph 10 C of our Contract with you dated December 2, 1944, you are hereby notified that on this date purchaser acquired title and we took delivery of the Cement Plant, and the undersigned as Forwarding Agent has the right to possession." (R. 21.)

Thereupon, on said January 3, 1945, title to the entire cement plant passed to the foreign purchaser pursuant to the contract of sale, possession of the cement plant was delivered to the export forwarding agent by the domestic seller, and the contractor-common carrier pursuant to its contract with the export forwarding agent began to dismantle and disassemble the cement plant, package and deliver the packages to the railroad common carrier. (R. 21.)

From the date of passage of title to the foreign purchaser on January 3, 1945, to the date when the last of the cement plant left the United States on January 29, 1946, the respective activities of the export forwarding agent, the contractor-common carrier, the railroad common carrier, and the steamship carrier, consisted of one integrated and continuous operation in effecting the exportation of the entire and complete cement plant. (R. 21-22.)

On March 5, 1945, while the contractor-common carrier was dismantling, packaging and loading the cement plant on the railroad cars of the railroad common carrier, and while the railroad common carrier was transporting 14 carloads to the port of embarkation, Appellee J. Emmett McNamara, Merced County Assessor, hereinafter referred to as "Assessor" levied

a personal property tax on the whole and entire cement plant. (R. 21-22.) (It may be noted that in prior years the cement plant had been assessed as real property.)

Thereafter, when it was pointed out that 14 carloads out of a total of 123 carloads were out of the jurisdiction of the County of Merced, the Assessor and District Attorney appeared before the Board of Supervistors of Merced County and requested that the assessment be reduced 12% and this was done. (R. 22, 85.)

The appellants paid the reduced tax under protest. (R. 22.)

On January 18, 1946, the entire cement plant covered by the contract of sale had been packaged and shipped out of and had left the County of Merced and the contractor-common carrier had fully performed its contract with the export forwarding agent. (R. 22.)

On January 29, 1946, the last carload of the entire, complete and operating cement plant sold to the foreign purchaser had been loaded on the steamship common carrier and had left the State of California and the United States. (R. 22.)

Thereafter this action was initiated by appellants to recover the tax paid under protest to appellees herein. (R. 22-23.)

As stated, all of the above facts were admitted in the answer, stipulated to, and accepted as correct in the opinion of the California Supreme Court.

SPECIFICATIONS OF THE ASSIGNED ERRORS INTENDED TO BE URGED BY APPELLANTS.

The appellants intend to urge each of its twenty assigned errors found in the Transcript (R. 127-133) as follows:

(1) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in sustaining the validity of the California Revenue & Taxation Code, Division I, as amended, construed, applied and enforced to impose a personal property tax upon a portion of an entire and complete cement plant here involved, as against appellants' contention that said Act, so construed, applied and enforced, is invalid under Article I, section 10, clause 2, of the United States Constitution.

(2) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the California Revenue & Taxation Code, Division I, as amended, when construed and applied to impose a personal property tax upon a portion of an entire and complete cement plant committed and in the process of exportation to Colombia, South America, and which was so exported, is not invalid under and repugnant to the provisions of Article I, section 10, clause 2, of the United States Constitution.

(3) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the tax levied upon and collected from appellants, Empresa Siderurgica, S. A., a corporation of Colombia, South America, and Van-

derburgh & Co., Inc., a California corporation, pursuant to the California Revenue & Taxation Code, Division I, as amended, was not an impost or duty on exports in violation of or repugnant to or within the meaning of Article I, section 10, clause 2, of the United States Constitution.

(4) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the preparation for export not only included: (a) the negotiations preceding the signing of the export sales contract; (b) the execution of the export sales contract; (c) the employment of the export forwarding agent; (d) the employment of Bigge; (e) the issuance of the export license; and (f) the establishment of the letter of credit; but also included: (g) the passage of title and delivery of the cement plant to the purchaser; (h) delivery of the cement plant to the export forwarding agent and its activities in contracting for the dismantling, packaging, loading, railroad cars, shipping space, preparation of foreign documents, bills of lading and other activities; and (i) delivery of the cement plant to Bigge and its activities in dismantling, packaging and shipping; and only excepted that part of the plant which had been actually loaded on railroad cars and left the county on March 5, 1945.

(5) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in failing to give consideration or effect to:

(a) That the contract of November 11, 1944, between Empresa and Kaiser was an export sales contract.

(b) The provisions of the export sales contract which, among other things, required passage of title to purchaser and delivery of the entire and complete cement plant to the purchaser's forwarding agent upon payment therefor.

(c) The provisions of the export sales contract which, among other things, provided for the sale of an entire and complete cement plant and which by its terms was not divisible or severable.

(d) The provisions of the Bigge contract which, among other things, required Bigge upon taking possession of the cement plant to dismantle, package and load on railroad cars without interruption or cessation until the entire cement plant had been completely dismantled, packaged and shipped.

(e) The provisions of the Bigge contract which, among other things, provided for the preparation for shipment of an entire and complete cement plant and which by its terms was not divisible or severable.

(f) The issuance of an export license by the Foreign Economic Administration permitting the exportation of the entire and complete cement plant.

(g) The provisions of the letter of credit for the account of Banco de Bogota, Medellin, Colom-

bia, South America, on behalf of appellant, Empresa Siderurgica, S. A., (the purchaser) for the balance of the purchase price of the entire cement plant which, among other things, required the presentation of the export license permitting the export of the entire cement plant to the Republic of Colombia, South America.

(f) The actual exportation of the entire cement plant to Colombia, South America, pursuant to the export sales contract, the Bigge contract, the export license and the letter of credit.

(6) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in failing to give consideration or effect to the fact that the following are the usual, necessary and regular steps to effect the exportation of the entire cement plant:

(a) The export sales contract of November 11, 1944.

(b) The employment of an export forwarding agent on December 2, 1944.

(c) The Bigge contract of December 2, 1944.

(d) The issuance of an export license by the U. S. Foreign Economic Administration on December 15, 1944.

(e) The issuance of a letter of credit in payment of the entire cement plant on January 3, 1945.

(f) The passage of title and delivery to the foreign purchaser on January 3, 1945.

(g) The delivery of the entire cement plant to the export forwarding agent on January 3, 1945.

(h) The delivery of the entire cement plant to Bigge on January 3, 1945.

(i) The integrated operation of the export forwarding agent in preparing foreign documents, bills of lading, negotiations for shipping space by rail and sea; the dismantling, packaging and loading on railroad cars by Bigge; the movement of the railroad cars to the seaboard; and the loading on the steamships at the seaboard which carried the entire cement plant to its foreign destination; all of which commenced on January 3, 1945, and continued without interruption or cessation until the whole of the cement plant left the United States on January 29, 1946.

(j) That the entire cement plant was actually exported.

(7) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the export sales contract was effective and operative as a matter of law to sever and change the entire cement plant from real property to personal property, which was so assessed as personal property by the County of Merced, but was not effective or operative as a matter of law as the

first step in and the commencement of the exportation of the said cement plant.

(8) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the passage of title of said cement plant to purchaser and the delivery of the cement plant to the purchaser, purchaser's export forwarding agent and Bigge, pursuant to the export sales contract, occurred prior to the commencement of exportation of said cement plant.

(9) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that delivery to the export forwarding agent on January 3, 1945, pursuant to the export sales contract and coupled with the subsequent acts of complete exportation of the entire cement plant, was not the equivalent of delivery to a common carrier for transportation.

(10) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that delivery to Bigge Drayage Co. on January 3, 1945, pursuant to its contract with the export forwarding agent, dated December 2, 1944, coupled with its subsequent acts of dismantling, packaging and shipping the entire cement plant to the foreign destination, was not equivalent to delivery to a common carrier for transportation.

(14) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that no exportation

of the cement plant commenced until the parts thereof were loaded on the cars of a railroad common carrier.

(12) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the property owner's argument that because 12% of the plant had been shipped out of the county and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained.

(13) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the integrated activities of the export forwarding agent and Bigge was an intention to export rather than a commencement of exportation.

(14) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the fact that a portion of the cement plant had actually been shipped, is not controlling as to that portion which is in the process of preparation for exportation, although there can be no question concerning the owner's intention to take it out of the country.

(15) The Supreme Court of the State of California erred in its final judgment in the above entitled cause, in its determination that the trial judge erred when he held, as a matter of law, that when the goods have been committed to exportation, a tax imposed upon them amounts to taxation of an export.

(16) The Supreme Court of the State of California erred in its final judgment in the above entitled cause, in its determination that the trial judge erred in holding that "proceeding to change * * * (the plant) from parts in place of a complete building, into a mass of disconnected materials made the completion of the exportation economically imperative. This was not a mere preparation of the plant for exportation; by such action and change the parts had 'been started upon such transportation' with the degree of certainty demanded by *Coe v. Errol* (116 U.S. 517), and the many cases which have endorsed it."

(17) The Supreme Court of the State of California erred in its final judgment in the above-entitled cause, in its determination that on March 5, 1945, the statutory date for the assessment of the personal property for the tax year 1945-46, the portion of the entire and complete cement plant being dismantled, and packaged, was not committed to exportation within the meaning of Article I, section 10, clause 2, of the United States Constitution.

(18) The Supreme Court of the State of California erred in its final judgment in the above entitled cause, in its determination that the tax levied upon appellants was not invalid, illegal or unenforceable and was not contrary to, or in violation of, the provisions of Article I, section 10, clause 2, of the Constitution of the United States, because said tax was levied on the portion of the cement plant which had not been loaded on the cars of a railroad common carrier.

(19) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the scope and effect of United States Constitution, Article I, section 10, clause 2, permits or requires different results as to the validity of a tax upon exports when (a) the goods are delivered for exportation to the foreign purchaser, purchaser's export forwarding agent and contractor, and (b) when the goods are delivered for exportation to a railroad common carrier.

(20) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in reversing the judgment of the Superior Court of the State of California.

SUMMARY OF ARGUMENT.

The Court below erred in deciding that no exportation of the Cement Plant commenced until after delivery of the Cement Plant to the Railroad Common Carrier. (Assignments of Error 1-20; R. 127-133.)

(1) The decision of the Court below that exportation does not start until the goods have been loaded on a common carrier is illogical, and would practically nullify the provisions of Article I, section 10, clause 2 of the Constitution, and would do away with none of the evils which it was the object of the Constitution to suppress. (pp. 27-28.)

(2) The article sold was an entire, complete and operative cement plant which was sold as a unit and not divisible. That the means chosen to effect the

exportation of the cement plant were relevant and appropriate to the contract made. (pp. 28-30.)

(3) While it was held that the export sales contract was effective to change the cement plant from real property to personal property, it was also the first step in and the commencement of the exportation of the entire and complete cement plant. (p. 30.)

(4) Delivery to the export forwarding agent and the contractor-common carrier marked the commencement of the exportation of the entire cement plant. (pp. 30-37.)

(a) Delivery of the cement plant to the export forwarding agent was equivalent to delivery to a common carrier. (pp. 37-40.)

(b) Delivery of the cement plant to the contractor-common carrier was equivalent to delivery to a common carrier. (pp. 40-41.)

(5) The process of exportation cannot be compared to the manufacture of an article prior to exportation. (pp. 41-42.)

(6) The entire, complete and operative cement plant was not divisible. (pp. 42-43.)

(7) The certainty that goods are headed to sea may exist though no common carrier is involved. (pp. 43-48.)

(8) The act which vested title in the foreign purchaser irrevocably committed the entire and complete cement plant to exportation. (pp. 48-51.)

(9) The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result. (pp. 51-56.)

(10) The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. (pp. 56-61.)

(11) For the purpose of determining whether articles are imports or exports, the determination of the question is governed by matters of substance and not form or the technical procedure with which the transaction is effected. (pp. 61-62.)

ARGUMENT.

That the entire, complete and operative cement plant was actually exported from California to Colombia, South America, in conformity with a contract for such exportation is not, and cannot be challenged.

Article 1, Section 10, Clause 2 of the United States Constitution reads:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's Inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The final opinion of the Court below is to the effect that a personal property tax on an entire, complete and operative cement plant may be reduced by 12% when it is learned that 14 car loads out of a total of 123 car loads have been delivered to a railroad common carrier by tax day, and that the tax as reduced on the remainder of the cement plant not yet delivered to the railroad common carrier was not repugnant to the Constitution. This remarkable conclusion is placed upon four grounds:

1. Delivery of possession to export forwarding agent was not the equivalent of delivery to a common carrier for transportation.

2. Delivery of possession to contractor-common carrier was not the equivalent to delivery to a railroad common carrier for transportation.

3. Appellants' argument that because 12% of the plant had been shipped out of the country and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained.

4. The fact that a portion of the plant had actually been shipped is not controlling as to that portion which was in the process of preparation for exportation, although there can be no question concerning the owner's intention to take it out of the country.

Basically, all four of the above referred to grounds are founded upon only one legal theory: That there

must be delivery to a common carrier before the cement plant or any part thereof becomes an export.

The correctness of each of the above grounds and the basis therefor is challenged by the appellants' Assignments of Error. (Assignments of Error 1-20; R. 127-137.) Since each of the four grounds hereinabove enumerated are so closely allied to the basis therefor, they will be discussed under the one heading.

All emphasis throughout the Argument will be ours unless otherwise noted.

THE CALIFORNIA SUPREME COURT ERRED IN ITS DECISION THAT NO EXPORTATION OF THE CEMENT PLANT COMMENCED UNTIL AFTER DELIVERY OF THE CEMENT PLANT TO THE RAILROAD COMMON CARRIER.

As heretofore stated the California Supreme Court based its conclusion that the statute as construed was not repugnant to the Constitution upon four grounds and that basically those four grounds were the result of one legal theory as follows: That there must be delivery to a common carrier before the cement plant or any part thereof becomes an export.

We submit that the slightest reflection will show the error and illogic of this view. If all that was intended by the Constitution was to prohibit taxation of exports after they had been loaded on a vessel or railroad car, the prohibition is meaningless and of no practical value. None of the evils which it was the express object of the framers of the Constitution to do away with

would have been ended. The seaboard states could have continued to tax the goods sent from other states so long as they were not loaded on a common carrier.

The article sold for export was an entire, complete and operative cement plant. It was sold to the foreign purchaser in its existing form and place. The only representation and warranty in the contract of sale was that it was operated until July 1, 1944, and it was warranted that nothing had been removed between that date and the date of the contract of sale, November 11, 1944, which would make it inoperative. An assembled and operative cement plant was needed by the foreign purchaser in Colombia, South America, and that was the article purchased.

The exportation of the cement plant was the only act to be done upon the consummation of the sale.

The foreign purchaser in its contract of sale with the domestic seller provided that upon the passage of title to it of the cement plant that the domestic seller would deliver possession of the cement plant to an export forwarding agent for its exportation. The export forwarding agent in the performance of its obligations in handling the exportation, entered into a written contract with a contractor-common carrier for the dismantling, packaging, and loading on the cars of the railroad common carrier the entire and complete cement plant.

The first point to be considered is, what was the article of commodity to be exported? It is the position of appellants that the contract of sale between the

domestic seller and the foreign purchaser determines this question and that an entire, complete and operative cement plant was sold.

This Court said in part in *York Mfg. Co. v. Colley*, 247 U.S. 21, 24-25:

> "* * * since the ruling in McCulloch v. Maryland, 4 Wheat (US) 316, there has been no doubt that the interstate commerce power embraced that which is relevant or reasonably appropriate to the power granted, so also from such doctrine there can be no doubt that *the right to make an interstate commerce contract includes in its very terms the right to incorporate into such contract provisions which are relevant and appropriate to the contract made.*"
>
> *York Mfg. Co. v. Colley*, 247 U.S. 21, 24-25.

The foreign purchaser contracted to purchase an entire, complete and operative cement plant and this case comes before this Court by stipulation that that is the article which was purchased. Further, that the foreign purchaser had the right to incorporate into such contract provisions which were relevant and appropriate to effect the exportation of the entire, complete and operative cement plant. The foreign purchaser required that the domestic seller represent that the cement plant was operating until July 1, 1944, and required that the domestic seller warrant that no part had been removed between that date and the date of the contract of sale. The foreign purchaser also required that the contract provide that upon passage of title of the cement plant to it, that the entire cement

plant would be delivered to an export forwarding agent for exportation. The requirements as to the means of exportation were relevant and appropriate to the contract made.

In previous years the cement plant had been assessed as real property. However, on March 5, 1945, in recognition of its changed status by reason of the contract of sale and its movement from its site, the assessor taxed the entire cement plant as personal property. Thereafter, when it was pointed out that on tax day 14 carloads had left the jurisdiction of Merced County, the tax assessor (by calculating that 14 carloads out of 123 carloads was 12%) requested the board of supervisors to reduce the tax by 12% which was done. Certainly, if the export sales contract was effective for the purpose of changing the cement plant from real property to personal property, it was likewise effective for committing to exportation the entire and complete cement plant, and such contract was the first step in and the commencement of the exportation of the cement plant.

The point upon which this case turns is the time when exportation commenced.

It is the position of appellants that exportation commenced on January 3, 1945, when all of the conditions precedent to the sale had been performed; i.e., the issuance of the export license by the federal government and the payment of the purchase price to the domestic seller; at which time the title passed to the foreign purchaser; delivery of the cement plant was

taken by the export forwarding agent; and the contractor-common carrier began dismantling, packaging and loading the cement plant on the cars of the railroad common carrier.

The California Supreme Court in its decision held that the activities of the export forwarding agent and the contractor-common carrier was evidence only of an intention to export and not the commencement of exportation and that when 11 carloads of the cement plant had been loaded and left Merced County by tax day (March 5, 1945) only that part of the cement plant was exempt from the personal property tax and approved the collection of the tax less 12%.

In the final opinion of the Court below it is said:

> "The property owner's argument that because 12% of the plant had been shipped out of the county and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained. This contention assumes that intention to export rather than the commencement of exportation is the determining factor. The fact that a portion of the plant had actually been shipped is not controlling as to that portion which was in the process of preparation for exportation, *although there can be no question concerning the owner's intention to take it out of the country.*"
>
> 194 P. (2d) 527, 530. (R. 108-109.)

In support of its decision, the California Supreme Court cites *Coe v. Errol*, 116 U.S. 517.

Coe and others owned a large number of spruce logs which had been drawn down to the town of Errol, New

Hampshire, and placed in Clear Stream and on the banks thereof preparatory to their being floated down the Androscoggin River to the State of Maine. The timber had been cut in New Hampshire the spring and summer before and were held at Errol by the owners waiting for the spring floods at which time the logs would be floated to Maine.

In holding that the logs were properly subject to local taxation, with which appellants have no argument, the Court said:

> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his *partial preparation* to do so, exempt them from taxation? This is the precise question for solution.
>
> "This question does not present the predicament of goods in course of transportation through a State, though detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, *would the goods in question be when actually started in the course of transportion to another State*, or delivered to a carrier for such transportation. (p. 525.)
>
> * * * * * * *
>
> * * * Though intended for exportation, they may never be exported: the owner has a perfect right to change his mind; and *until actually put in motion, for some place out of the State*, or committed to the custody of a carrier for trans-

portation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? (p. 526.)

* * * * * * *

"But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or *have been started upon such transportation in a continuous route or journey.* (p. 527.)

* * * * * * *

"* * * And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. It is true, it was said in the case of *The Daniel Ball*, 10 Wall. 557, 565: '*Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.*' But this movement does not begin until the articles have been shipped or *started for transportation from the one State to the other.* (p. 528.)

* * * * * * *

"* * * *Until actually launched on its way to another State*, or committed to a common carrier for transportation to such State, *its destination is not*

fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. (p. 528.)

* * * * * * *

* * * *Until* shipped or *started on its final journey out of the State* its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.

"The application of these principles to the present case is obvious. The logs which were taxed, and the tax on which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, *been* shipped or *started on their final voyage or journey to the State of Maine.* They had only been drawn down from Wentworth's location to Errol, the place from which they were to be transported to Lewiston in the State of Maine. There they were to remain until it should be convenient to send them to their destination." (p. 528.)

Coe v. Errol, supra, is quoted from at length for the reason that it is relied upon by appellants in this Court, and was also relied upon in the California Supreme Court and the trial Court in support of its position that the entire cement plant was an export and therefore not taxable. This decision was also relied upon by the California Supreme Court and the appellees in support of their position that only that part of the cement plant which had been delivered to the railroad common carrier was exempt from taxation. This decision was also relied upon by the trial Court in holding that the entire cement plant was an export and therefore not taxable.

In *The Daniel Ball*, 10 Wall. 557, 565, quoted in *Coe v. Errol*, supra, this Court said:

> "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced."

The California Supreme Court in complete disregard of the contract of sale as to the unity of the article sold, the cement plant, held that only that part of the cement plant which had been delivered by the contractor common carrier to the railroad common carrier was exempt from taxation, seizing upon *Coe v. Errol*, supra, to sustain its position.

However, an analysis of *Coe v. Errol*, supra, reveals that while the best evidence of exportation may be the delivery of the article to a common carrier, but in each and every place the Court so holds, it also points out that this is not the only and exclusive manner of exportation. For example:

> "*when actually started in the course of transportation to another State*, or delivered to a carrier for such transportation. (p. 525.)

> "until they are committed to the common carrier for transportation out of the State to the State of their destination, *or have started on their ultimate passage to that State*." (p. 525.)

> "*until actually put in motion for some place out of the State*, or committed to the custody of a carrier for transportation to such place. (p. 526.)

"*when not under motion or* shipment, * * * (p. 526.)

"until they have been shipped, or entered with a common carrier for transportation to another State, *or have been started upon such transportation in a continuous route or journey.*" (p. 527.)

"But this movement does not begin until the articles have been shipped *or started for transportation from the one State to the other.* (p. 528.)

"*Until actually launched on its way to another State,* or committed to a common carrier for transportation to such state, * * * (p. 528.)

"Until shipped *or started on its final journey out of the State* * * * (p. 528.)

"The logs * * * had not * * * been shipped *or started on their final voyage or journey to the State of Maine.*" (p. 528.)

It is submitted that *Coe v. Errol,* supra, does not hold that the only way an article may become an export is by delivery to a common carrier, which is the holding of the California Supreme Court in its decision in this case. The use of the word "or" in *Coe v. Errol,* supra, is, we believe, significant.

In the instant case, coincidentally with the passage of title to the foreign purchaser, delivery and possession of the entire cement plant was taken by the export forwarding agent. On the same day, pursuant to a written contract with the export forwarding agent, the contractor-common carrier began dismantling, packaging and loading on the cars of the railroad common carrier the entire and complete cement plant. From the

date of passage of title to the foreign purchaser to the date when the last of the cement plant left the United States, the respective activities of the export forwarding agent, the contractor-common carrier, the railroad common carrier, and the steamship carrier, consisted of one integrated and continuous operation in effecting the exportation of the entire and complete cement plant.

Certainly the cement plant had started in the course of transportation, started on its ultimate passage to its foreign destination, was actually put in motion, started upon such transportation in a continuous route or journey, launched on its way to its foreign destination, and started on its final voyage or journey to Colombia, South America, as required by the leading case of *Coe v. Errol*, supra.

The Court below in its final decision held that delivery to an export forwarding agent was not equivalent to delivery to a common carrier. The Court said:

> "On tax day, the machinery which is the subject of the assessment here under attack had been delivered into the possession of the forwarding agent for the purpose of packing and shipping it. But the preparations for shipment, including the preparation of foreign documents and bills of lading, negotiations for shipping space by rail and sea and incidental activities in readying the machinery for shipment out of the country are not the equivalent of delivery to a common carrier for transportation."

191 P. (2d) 527, 530. (R. 108.)

In *Clarke & Co. v. Clarke* (C.C. Ga.), 3 Woods, 408, 410-11, Federal Cases No. 2846, p. 943 at pp. 944-5, the Federal Court considered the taxation of goods in the possession of an exporter. There, the Court said in part:

> "The logs on which the tax was levied were the property of and *were in possession of persons engaged exclusively in exporting timber to foreign countries*, they were purchased from citizens of Georgia for the purpose of exportation, they were in a port of the United States awaiting shipment, they had been inspected according to the laws of the state, and the purpose of the owners to export the logs was, after the levy of the tax thereon, actually carried out and the logs were exported.
>
> "It is clear, and it seems to be conceded by defendants, that if the logs had actually been on shipboard when the tax was levied, they might have well been considered exports. *Is the fact that they were still on land, though awaiting shipment, such a circumstance as deprives them of their character as exports?* The reasoning of the court in the case of Brown v. Maryland, 12 Wheat. (25 U.S.) 419, *demonstrates that it is not.*"

There is not a single decision of this Court which has considered Article I, Section 10, Clause 2 of the Constitution which has limited or circumscribed it as did the opinion of the Court below. On the contrary, all of the decisions of this Court which have considered the constitutional prohibition have given it a wide and liberal interpretation in order to effectuate the obvious intention of the framers of the Constitution

that exports should be free from state taxation. To that end, it has been held that the every phase and incident of an export such as bills of lading, charter parties and marine insurance are exempt from state taxation. See:

United States v. Hvoslef, 237 U.S. 1, 13;
Fairbanks v. United States, 181 U.S. 283, 292-3;
Thames & Mersey Insurance Company v. United States, 237 U.S. 19;
N. Y. and Cuba Mail S. S. Co. v. United States, (D.C., N.Y.) 125 Fed. 320.

The observation of Chief Justice Hughes, speaking for this Court in *Willcuts v. Bunn*, 282 U. S. 216, 228, in interpreting the first three of the above decisions, though dictum, is most pertinent:

> "Similarly, with respect to federal taxation of articles exported from any State, the constitutional inhibition gives immunity *to the process of exportation* and to the transactions and documents embraced in that process. Fairbanks v. United States, 181 U. S. 283; United States v. Hvoslef, 237 U. S. 1; Thames & Mersey Marine Insurance Company v. United States, 237 U. S. 19. *Only on that construction can the constitutional safeguard be maintained.*"
>
> *Willcuts v. Bunn*, 282 U. S. 216, 228.

Clearly, the delivery of the cement plant to the export forwarding agent was a phase of, and a necessary incident in,—indeed, an essential part of the process of, the exportation of the cement plant. It was purchased solely for the use of the foreign purchaser at

Medellin, Colombia, South America. In order to get it there, it was as essential and as necessary to move the entire cement plant from the plant site, as it was for the railroad common carrier to move it to the port of embarkation or the vessel to carry it to Colombia.

The Court below in its final decision held that the work of dismantling, packaging and loading on the cars of the railroad common carrier by the contractor common carrier was not the equivalent to delivery to a common carrier for transportation. The Court said:

> "The fact that the Bigge company was licensed as a common carrier in interstate and foreign commerce is not material, for it was not employed to perform the functions of such a carrier; it undertook only to dismantle and prepare the property for shipment. It cannot, therefore, be seriously contended that delivery of possession to Bigge was equivalent to delivery to a common carrier for transportation."
>
> 194 P. (2d) 527, 530 (R. 108).

The decision of this Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 92, 94, seems to us conclusive on this point. There, the appellant was engaged in several activities, among them loading and unloading ships. The excise tax of the State of Washington required payment of a percentage of gross income for the privilege of doing business in that state. Suit was instituted by the appellant to enjoin the Tax Commission from enforcing the tax on the ground that appellant's work in loading and unloading vessels was interstate and foreign

commerce. The suit was dismissed by the trial Court and the judgment affirmed by the Supreme Court of Washington. In reversing the latter judgment this Court, speaking through Justice Cardozo, said, in part:

> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master.
>
> * * * * * * *
>
> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts."
>
> *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 92, 94.
>
> Cf. *Joseph v. Carter & Weekes S. Co.*, 330 U. S. 422.

The California Supreme Court in support of its opinion cites *Cornell v. Coyne*, 192 U. S. 418. This was a case involving a tax on the manufacturers of filled cheese. Although the filled cheese was manufactured for export, this Court held that the manufacturing process was not commerce and with this conclusion we agree.

In comparing *Cornell v. Coyne*, supra, with the facts of our case, it is submitted that the two situations are not at all analagous. In the former, the filled cheese was not filled cheese until it was manu

factured, it was not *in esse*, it had yet to be brought into existence, it could not move in commerce as filled cheese until it had become filled cheese. In the instant case, however, the cement plant was already manufactured, it was in existence and nothing was required except to export it. The Constitution does not require a person to do an impossible act to qualify for the benefits granted under the Constitution. But to say, as the California Supreme Court said, when the cement is delivered to a railroad common carrier or any part thereof, it becomes an export is to impose an impossible condition. A cement plant requiring 123 carloads to transport it to the seaboard was not an object which could be delivered to a railroad carrier in its existing form. The question always considered by this Court is: *Was that which was done reasonably necessary to effect its exportation?* Certainly, there can be no doubt that the answer is in the affirmative in the instant case.

Then too, we come to the novel question raised by the California Supreme Court that an article, indivisible by its very nature, an entire, complete and operative cement plant, may be divisible for tax purposes. There is no argument that the contract of sale was not divisible. The foreign purchaser could not take 14 car loads (12%) and pay the domestic seller 12% of the price. Nor was a cement plant less 12% a cement plant. If this is to be the rule of law, every year in California at 12:00 o'clock noon on the first Monday in March and in every State in the United States on the day set for fixing the tax on

personal property, the tax assessors will be measuring the amount of oil which has not yet gone through the pipes into tank cars being loaded, the amount of grain which has not been loaded into the hold of boats being loaded, and in fact everywhere, it will be a matter of computing what has been loaded and what remains to be loaded. Automobiles sold for export may be already loaded on boats, but their wheels not yet loaded will be taxed as being a percentage of an automobile. What percentage of a steam shovel is its bucket? Just because an article is shipped in pieces and some parts of it move before others, is its unity destroyed? We think not and it is noteworthy that the California Supreme Court has not cited any cases to support this unusual holding.

This Court has held in a long and unbroken line of decisions that exportation commences with the first movement of the goods towards the sea. Clearly, the dismantling, packaging and loading operations of the contractor-common carrier was such a movement.

The Court below in its final decision gave controlling effect to the fact that the contractor-common carrier did not carry the cement plant other than from the plant site to the railroad tracks running alongside the plant. The opinion indicates that a different result might have been accomplished if the contractor-common carrier had moved the cement plant by truck to the port of embarkation.

At the time this exportation was taking place the United States was engaged in World War II. Railroad cars and shipping space were difficult to obtain

and only obtained by permits received from the federal government. At the time the contract was made with the contractor-common carrier it was considered that a possibility might occur in which an allocation of shipping space had been made and that no railroad cars would be available to transport it in time to meet the boat. Such an event never took place, but the contractor-common carrier was licensed and available to perform this function had it been necessary.

But the Constitution of the United States does not make the prohibition against a state tax on exports dependent upon the formalities with which the exportation is effected.

The view of the Court below is directly contrary to the recent decision of this Court in *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 82. This Court said in part:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. *But the same degree of certainty may exist though no common carrier is involved.*"

The *Richfield* case, supra, 329 U. S. 69, 74, is one where the California Supreme Court adopted the same reasoning as in the instant case and on appeal was reversed by this Court. In that case oil was delivered to a vessel owned by the New Zealand government by the Richfield Oil Corporation at the docks of the oil company. A sales tax was imposed on the sale. The

California Supreme Court held that if delivery had been made to a common carrier, the cargo of oil would be exempt from the tax. This Court, in reversing the California Supreme Court said in part:

"The Supreme Court of California held that this provision (Article I, Section 10, Clause 2 of the Constitution) did not bar the tax because the delivery of the oil which resulted in the passage of title occurred prior to the commencement of the exportation. The court suggested, and the appellee concedes, that a different result might follow if the oil had been delivered to a common carrier; 'for then it would have been placed in the hands of an instrumentality whose sole purpose is to export goods, thus indelibly characterizing the process as a part of exportation.' 27 Cal. (2d) p. 153, 163 P. 2d p. 3. (p. 74.)

* * * * * * *

"We do not pursue the inquiry as to the validity of the tax under the Commerce Clause. For we are of the view that whatever might be the result of that inquiry, the tax is unconstitutional under Article 1, Section 10, Clause 2. (p. 75.)

* * * * * * *

"The requirement that foreign commerce be involved (Woodruff v. Parham, 8 Wall. (US) 123, 136, 19 L. ed. 382, 386) is met, for concededly the oil was sold for shipment abroad. (p. 78.)

* * * * * * *

"The fact that delivery to a common carrier for export gave the sale immunity in A. G. Spalding & Bros. v. Edwards, 262 U.S. 66, 67 L. ed. 865, 43 S. Ct. 485, supra, is seized upon as stating a rule that the process of exportation has not

started until such delivery has been made. And cases like Superior Oil Co. v. Mississippi, 280 U.S. 390, 74 L. ed. 504, 50 S. Ct. 169, are relied upon as indicating that delivery to the purchaser is not sufficient. That case arose under the Commerce Clause. Mississippi was upheld in its effort to tax a distributor or wholesaler who purchased gasoline and later took it to Louisiana for sale. The court said, p. 395, that although the course of business indicated the likely destination of the oil, it was 'in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes.' The court held, therefore, that the tax was not on goods moving in interstate commerce. But it added, p. 396, 'Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here.'

"*The certainty that the goods are headed to sea and that the process of exportation has started* may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. *But the same degree of certainty may exist though no common carrier is involved.* The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in Cali-

> fornia waters and was not bound for its destination until it started to move from the port. *But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use.* It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. *The means of shipment are unimportant so long as the certainty of the foreign destination is plain.*" (pp. 82-83.)

In the instant case, upon passage of title to the foreign purchaser, delivery was not made to it as was the case in *Richfield Oil Corp. v. State Board*, supra. Delivery of the entire cement plant was made to an export forwarding agent and a contractor-common carrier, both of which were independent instrumentalities of commerce and acted only for the foreign purchaser under and by virtue of written contracts, the sole purpose of which was the exportation of the entire and complete cement plant.

The Court below intimates that the contractor-common carrier did not perform the functions of a carrier. Webster's New International Dictionary, Second Edition, Unabridged, 1944, defines carrier as follows:

> "carrier * * * 1. One who or that which carries, or conveys; * * *
>
> * * * * * * *
>
> 2. One (whether a single person, a group of persons, or a corporation) employed in, or engaged

in the business of, carrying goods for others for hire, as a porter or teamster; specif., a common carrier." (p. 411.)

It is true that the distance which the contractor-common carrier transported the cement plant was not great, i.e., from the place it was located on the plant site to the railroad tracks running alongside of the plant site; but certainly such transportation was but a link in the entire chain of transportation from the place where the plant was located as sold to its ultimate destination at Medellin, Colombia, South America. The distance of the carriage or the movement of the entire commodity is not the determining factor. The fact that movement has begun which has as its effect the beginning of exportation and which is subsequently carried out, is the fundamental requirement.

It is submitted that the very act which vested title in the foreign purchaser irrevocably committed the entire and complete cement plant to exportation as was pointed out in *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66, 67. Indeed, we submit that the instant case cannot be distinguished from the *Spalding & Brothers v. Edwards* case upon which appellants relied in the Court below but which decision was neither referred to nor even cited in the opinion of the California Supreme Court in this case.

A. G. Spalding & Bros. v. Edwards, supra, involved the following facts. Delgado & Compania, a commercial firm in the City of La Guaira, Venezuela, ordered

Scholtz & Company, an export forwarding agent in New York, to buy for their account and risk a certain number of baseballs and baseball bats at a stipulated price. Scholtz & Company then purchased the required merchandise from the plaintiff, delivering to it a written export order directing the packing and marking of the goods, and that they be sent to the Atlantic and Caribbean Steam Navigation Company, an exporting carrier in New York. The plaintiff marked and delivered the goods as directed and was given a receipt by the carrier which it sent to Scholtz & Company, and which was exchanged by them for an export bill of lading in their own name. Scholtz & Company paid the plaintiff the agreed price and was later paid its commission by its principals.

The District Court and the Circuit Court of Appeals upheld the tax, but their judgments were reversed by this Court which, speaking through Justice Holmes, said, in part:

> "* * * The question is whether the sale was a step in exportation, assuming as appears to be the fact, that the title passed at the moment when the goods were delivered into the carrier's hands.
>
> "The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant if in this case the tax was laid on articles exported from any State, because that is forbidden in terms by the Constitution (citing numerous cases). * * *. Articles in course of transportation cannot be taxed (citing cases). * * * So we return to the question that we

have stated. To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary. In this case, for instance, while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants. (Cornell *v.* Coyne, 192 U. S. 418. Heisler v. Thomas Colliery Co., 260 U. S. 245.) On the other hand no one would doubt that they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun.

"The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. *The expected and accomplished effect of the act was to start them for that port.*"

A. G. Spalding & Bros. v. Edwards, 262 U. S. 66, 68-69.

So, in the instant case, the delivery by the domestic seller to the export forwarding agent and the contractor-common carrier upon the payment for the entire and complete cement plant, passed the title to

the foreign purchaser and irrevocably committed it to exportation.

Justice Holmes, after the portion of his decision quoted above, continued:

> "* * * *The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result.* Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use. *There was not the slightest probability of any such change and it did not occur.* The purchase by Scholtz & Co. was solely for the purpose of Delgado & Cia. and for their account and risk. *Theoretical possibilities may be left out of account.*"
>
> *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66, 69-70.

In the instant case, there were not even any theoretical possibilities. The foreign purchaser was not located in this country nor did it own the land on which the plant was located. The export forwarding agent and the contractor-common carrier, while they had possession, could not use it for purposes of their own. Applying the same reasoning to delivery to a railroad common carrier it might be said that the railroad would not deliver the export to the port of embarkation because it might take it elsewhere within the state and use it for purposes of its own. Or the steamship carrier might load it in San Francisco and

take it to Los Angeles instead of fulfilling its contract of carriage to South America. But as was said in *A. G. Spalding & Bros. v. Edwards*, supra, "*Theoretical possibilities may be left out of account.*" 262 U. S. 66, 70.

Judge Peter J. Shields, the trial judge, in a clear analysis of the facts as applied to this case, has this to say in part (R. 93-95):

> "In cases like this where goods have been purchased for exportation and action has been taken in execution of that purpose it is not a question of whether any particular thing has been done but of whether or not what has been done in furtherance of a contract of export has so far committed the goods to exportation that there is no reasonable probability that the proposed export will not be concluded; that there remains no reasonable question or hypothesis upon which their exportation can be doubted. I think that it can be said that when the tax was levied upon the materials in this case that it had become substantially certain that the mechanisms constituting the plant would be exported, as they subsequently were. This seems unquestionable when the facts as they existed March 5, 1945 are viewed from their several angles:
>
> "1. The materials of the plant became committed to export when the Bigge Company began dismantling the building. At that time the plaintiff had spent a great deal of time and effort in furtherance of his intention to export the whole plant. The firmness of its intention to export this property is shown by the fact that it would not commit itself to its purchase until it had obtained

a license permitting its export. It had paid for the property. Before the Bigge Company had attacked it the plant had been a complete manufacturing unit. Immediately thereafter it was in process of destruction as such; the complete demolition of the structure was certain, the plaintiff was under contract to take it down and remove it from the premises. The plant could not have been re-erected upon its existing site; the plaintiff did not own it. At that time it was certain that what had been the building would soon be a mass of parts. In the circumstances it was certain that they would come to be such at the time the Bigge Company first went to work.

"These parts when placed in some warehouse or laid out on some lot which the plaintiff might secure would be mere 'scrap' and of merely speculative value for any purpose except for the use for which they were purchased.

"I think that the payment for the property and proceeding to change it from parts in place of a complete building, into a mass of disconnected materials made the completion of the exportation economically imperative. This was not a mere preparation of the plant for exportation; by such action and change the parts had been started upon such transportation with the degree of certainty demanded by *Coe v. Errol* and the many cases which have endorsed it.

"In this case, stronger than in the Hughes Bros. case the first owner of the plant had been paid for his plant and it was at that time in the sole possession of the Plaintiff. Thus one source of uncertainty as to whether the purpose to export would be executed did not exist; the Kaiser

Company could not prevent it. The only contingency upon which the export would be abandoned after the demolition of the building had become assured was therefore, that the plaintiff would abandon his purpose and sell the parts here at a substantial loss, or re-erect the plant in California where the plaintiff was not engaged in business. This suggests an improbable hypothesis. There was not the slightest probability of any such change, and it did not occur." *Spaulding Bros. v. Edwards*, 262 U. S. 66.

"In reaching this conclusion I am not considering the shipment of the twelve per cent of the property which was later exported as this fact was not certain at the time the Bigge Company began taking the building down.

"2. If the exportation of the materials of the plant was not before assured, that became certain when the twelve per cent of the corpus of the building had been sent abroad. In support of this conclusion I repeat all of the elements of certainty of export mentioned above and in addition I cite this circumstance. Whatever possibility there might have been that after plaintiff had torn the plant down and carried the parts off the premises that it would sell them or re-erect them into a plant in California would be rendered extremely improbable when it appeared that it had kept here only a part of the materials of the plant which of course could not be sold as the materials from which a plant could be built or used to reassemble the old one.

"3. When the building was in process of demolition and twelve per cent of its parts had been exported the entire plant was in process of 'move-

ment toward the sea, as required by the source case of *Coe v. Errol*. The plant was a unit composed of many parts. It was of great size and weight and could only be moved through moving the parts as they were moved here. When the first shipments were made from the plant we would not say that the contractors were moving a beam or a brace; we would say that they had begun to move the plant, that the entire property was in process of moving. It could not be said as part after part of the plant had been moved down to the last rod or pulley, that what was left had remained unmoved in a very appreciable way every abstraction from the building affected what was left. If a body of stevedores had been hired to unload a ship, at their first movement we would not say that they were moving a piano, or a sack of wool, we would say that they were unloading the ship. In this case when the plaintiff exported twelve per cent of the plant and was in process of shipping the rest the movement of the whole plant toward the sea had begun, as in the Hughes Brothers case where the first logs were being 'pushed' into the stream the whole mass was being pushed in.

"For the reasons stated there could remain no reasonable doubt that at the time the tax was levied that the whole shipment would be made as it finally was.

"The means of shipment are unimportant as long as the certainty of the foreign destination is plain. *Richfield Oil Co. v. State*, supra. Where the Court finds from the 'circumstances' that an export trade had been actually intended and carried through the Court will be liberal in con-

> stating the manner in which the export had been executed. *Carson Petrol Co. v. Vial*, 279 U. S. 95."
>
> Opinion of trial judge. (R. 93-95.)

The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith.

It is submitted that the means selected in this case in the light of all the circumstances, satisfies that inquiry beyond all doubt.

> "There has been a liberal construction of what is continuity of the journey, in cases where the Court finds from the circumstances *that export trade has been actually intended and carried through.*"
>
> *Carson Petroleum Company v. Vial*, 279 U. S. 95, 105-106.

See, also:

> *Railroad Commission v. Worthington*, 225 U. S. 101, 108-111;
>
> *Western Oil Refining Company v. Lipscomb*, 244 U. S. 346, 349-350.

In the last case cited, the State of Tennessee sought to impose a privilege tax upon goods shipped into Tennessee from Indiana, the goods being shipped in cars to the plaintiff at Columbia, Tennessee, where a portion were delivered, and the remainder rebilled to the plaintiff at Mount Pleasant, Tennessee. The Supreme Court of the State held that no tax could be

levied upon the goods delivered at Columbia, but that the reshilling of the goods to Mount Pleasant constituted intra-state commerce. In reversing this decision, this Court said in part:

"Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another a reshilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. *As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive.* (Citing a great number of cases.)

"Here, when the cars were started from Illinois and Indiana, it was intended by the shipper, as is expressly conceded, that they should be taken to Columbia, Tennessee, where a portion—a definite portion—of the contents of each was to be taken out and delivered, and that the cars, with the remainder of the contents, should proceed to Mount Pleasant in the same State; *and this is what actually was done.*"

Western Oil Refining Company v. Lipscomb, 244 U. S. 346, 349.

Here, when the contracted common carrier began to dismantle and package the cement plant it was intended that it should be placed on the cars of the railroad carrier for transshipment to the port of embarkation where the cement plant would be reloaded on the

vessel to take the plant to Colombia, South America, *and that, in fact, was actually done.*

Clear as it seems to us that the exportation of the cement plant had commenced when the export forwarding agent and the contractor-common carrier had taken delivery and simultaneously began their respective integrated activities, it is not necessary even to maintain that proposition. At the time the tax was assessed, 14 carloads of the cement plant (12%) were on their way by rail and boat to their foreign destination.

In conformity with the rule of *Coe v. Errol*, supra, this Court has held in an unbroken line of decisions that exportation starts with the first movement of the goods towards the sea.

It is believed that more than ninety percent of the exports of this country are handled by export forwarding agents, and the administration of the California Sales Tax statute recognizes this fact and provides for the exemption from sales tax when goods are delivered to an export forwarding agent in the same manner as when delivered to a carrier.

Section 6352, California Revenue and Taxation Code, provides for exemption from sales taxes those taxes prohibited by the Constitution or laws of the United States to the same effect as Section 202, one of the sections herein involved. In connection with the administration of Section 6352, supra, the California State Board of Equalization issued Ruling No. 55, the pertinent parts of which are as follows:

"Interstate and Foreign Commerce.

"(a) Sales Tax. (1) Exempt Transactions.

"Sales tax does not apply to sales of property which is:

* * * * * * *

"(C) Shipped to a point outside this State, pursuant to the contract of sale, by delivery by the retailer to such point by means of (1) facilities operated by the retailer, (2) delivery by the retailer to a carrier for shipment to a consignee at such point, or (3) *delivery by the retailer to a custom's broker or forwarding agent for shipment outside this State.*"

It is submitted that there is no basis under the most technical of considerations that the sale of the entire and complete cement plant was a local transaction or that the means employed were other than reasonable and necessary to effect the cement plant's exportation.

The parties to the transaction had no other object than the exportation of the entire and complete cement plant from California to Colombia, South America. The contract, and the documents executed pursuant to the contract, required it, and the delivery of the cement plant to the export forwarding agent and the contractor-common carrier was just as much a part of the exportation process as was the carriage to the port of embarkation by the railroad common carrier and, the carriage to Colombia by the many vessels which carried it there.

In *Hughes Bros. Timber Co. v. Minnesota*, 272 U. S. 469, 475, this Court said in part:

> "Both parties intended interstate shipment, they had bound themselves to it, the logs were segregated and moving in the contemplated journey, which neither could prevent if they carried out their agreement. The delays in the continuity of movement were only incidental to the journey and the necessary change in the mode of transportation."
>
> *Hughes Bros. Timber Co. v. Minnesota*, 272 U. S. 469, 475.

And in *State of Texas v. Anderson, Clayton & Co.*, 92 Fed. (2d) 104, 107, the Circuit Court of Appeals said in part:

> "It is well settled that, in determining whether a particular movement of freight is interstate or intrastate or foreign commerce, the intention existing at the time the movement starts governs and fixes the character of the shipment."
>
> *State of Texas v. Anderson, Clayton & Co.*, 92 Fed. (2d) 104, 107.

In *Multnomah County v. Dant & Russell, Inc.*, 158 Ore. 350, 354, 75 P. (2d) 986, the Supreme Court of Oregon said in part:

> "The inhibition of the Constitution of the United States against tax upon exports relates particularly to sales by a citizen of this country to a citizen of some foreign country."
>
> *Multnomah County v. Dant & Russell, Inc.*, 158 Ore. 350, 354, 75 P. (2d) 986.

In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290, this Court said in part:

"On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation."

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290.

And conclusive upon the question before us that delivery to a common carrier is not required before an export becomes exempt from taxation under the Constitution, this Court has consistently held that substance and not form governs. This Court in *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 662, 663, said, in part:

"For the purpose of determining whether petitioner was the importer in the constitutional sense, it is immaterial whether the title to the merchandise imported vested in him who caused it to be brought to this country at the time of shipment or only after its arrival here * * * For in determining the meaning and application of the constitutional provision, *we are concerned with matters of substance not of form*. When the merchandise is brought from another country to this, *the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected.*"

Hooven & Allison Co. v. Evatt, 324 U. S. 652, 662, 663.

See, also, to the same effect:

Carson Petroleum Co. v. Vial, 279 U. S. 95, 103;

In re Globe Varnish Company (C.C.A.), 114 F. (2d) 916.

We submit that the four grounds upon which the California Supreme Court based its decision are wholly untenable, are both illogical and directly contrary to all of the applicable decisions of this Court, and if sustained, would defeat the manifest intent and purpose of the Constitution.

CONCLUSION.

From the inception of the negotiations, both parties to the transaction had but one thing in mind: the exportation of the entire and complete cement plant to Medellin, Colombia, South America. The negotiations proceeded to an agreement and a contract was written and executed. The property sold was identified with particularity as an entire, complete and operative cement plant which included the quarry equipment operated in conjunction with the plant itself as well as spare parts and supplies. It was sold in its then present condition and as it was then presently situated. The contract was not to be effective for any purpose if an export license was not obtained from the United States Government. Title to the cement plant was to pass immediately upon the occurrence of the following two conditions, namely: (1) The issuance of an export license, and (2) the establish-

ment of a letter of credit in payment for the cement plant. The contract also provided that upon passage of title to the purchaser, the domestic seller was to deliver possession to an export forwarding agent for shipment to the foreign purchaser in Colombia. The export forwarding agent in order to perform its duties entered into a written contract with a contractor to dismantle, package for export, and to load the entire cement plant on the cars of a railroad common carrier whose tracks ran alongside the plant site. This contractor was also licensed as a common carrier by motor vehicle.

On January 3, 1945, the export sales contract and all other contracts executed pursuant thereto became effective. Title passed to the foreign purchaser, the export forwarding agent took delivery from the domestic seller and the contractor-common carrier began performance under its contract with the export forwarding agent. On January 3, 1945, and thereafter until the entire cement plant had completely left the United States, every step taken by each of the parties —the filing of applications for railroad cars with the United States Office of Defense Transportation, the filing of applications for shipping space with the U. S. Maritime Commission, the preparation of bills of lading, export declarations, consular invoices, and other documents by the export forwarding agent were integrated with the activities of dismantling, packaging and loading on cars of the railroad common carrier, both of which were integrated with the activities of the railroad carrier and the steamship

carriers; and were all steps incident and necessary to and a part of the exportation of the cement plant.

The decision of the Court below, as we have pointed out, ignores the actualities of the case—that it was impossible for the foreign purchaser to prevent the exportation of the entire cement plant. At the very beginning, the cement plant was in the possession of an export forwarding agent and a contractor-common carrier and both of which had the sole duty to effect its exportation. On tax day, the entire cement plant was then in the hands of and in the various stages of movement as required for exportation of the plant; i. e., part of the plant was loaded on the steamship carrier, part of the plant was loaded on the cars of the railroad carrier, and the balance of the plant was in the hands of the export forwarding agent and the contractor-common carrier.

And with that situation existing, to say that because 14 carloads, out of 123 carloads required to export the plant had been delivered to the railroad carrier and were outside Merced County, that the tax which was originally assessed on the whole of the plant is valid when reduced by 12%, is we believe, to disregard entirely the Constitution and, in effect, to nullify its provisions.

We respectfully submit that we have sustained each and every assignment of error, all of which are summarized in our twentieth and final assignment, that:

"The Supreme Court of the State of California erred in its final judgment in the above entitled

cause in reversing the judgment of the Superior Court of the State of California."

We respectfully submit that the judgment appealed from should be reversed.

Dated, Oakland, California,
January 17, 1949.

SCOTT D. KELLOGG,
Counsel for Appellants.

(Appendix Follows.)

Appendix

The following are the applicable provisions of the California Constitution and California Revenue and Taxation Code, as amended, and as in effect at the time of the assessment of the personal property tax on March 5, 1945, other than Sections 5136, 5137, 5138, 5139, and 5141, which deal with the procedure by which an improperly or invalidly levied tax could be recovered and which are set forth as they existed at the time of the filing of the appellants' protest and complaint. The appendix was submitted to counsel for appellees before being printed and counsel for the appellees have advised counsel for appellants that appellees agree that the following sections are the applicable portions of the statute.

"Section 1. All property in the state except as otherwise in this constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, . . . The word 'property,' as used in this article and section, is hereby declared to include . . . and all other matters and things, real, personal and mixed, capable of private ownership; . . ."

Section 1, Article XIII, Constitution of California.

"§ 103. 'Property' includes all matters and things, real, personal, and mixed, capable of private ownership.

"§ 104. 'Real estate' or 'real property' includes:

"(a) The possession of, claim to, ownership of, or right to the possession of land.

* * * * * * *

"(c) Improvements.

"§ 105. 'Improvements' includes:

"(a) All buildings, structures, fixtures, and fences erected on or affixed to the land, except telephone and telegraph lines.

* * * * * * *

"§ 106. 'Personal property' includes all property except real estate."

Deering's Revenue and Taxation Code of California, 1944 edititon, pp. 6 and 7.

"§ 201. All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code.

"§ 202. The exemption of the following property is as specified in Section 1 of Article XIII of the Constitution:

* * * * * * *

"(e) Property that is exempt under the laws of the United States."

Deering's Revenue and Taxation Code of California, 1944 edition, pp. 14 and 15.

"§ 405. Annually, the assessor shall assess all the taxable property in his county, . . . to the persons owning, claiming, possessing, or controlling it at 12 o'clock meridian of the first Monday in March. . . ."

Deering's Revenue and Taxation Code of California, 1944 edition, p. 25.

"§ 5136. After taxes are payable, any property owner may pay the taxes on his property under protest. A payment under protest is not a voluntary payment.

"§ 5137. The protest shall be in writing, specifying:

"(a) Whether the whole assessment is claimed to be void or, if only a part, what portion.

"(b) The grounds on which the claim is founded.

* * * * * * *

"§ 5138. Within six months after the payment, an action may be brought against a county or a city in the Superior Court to recover the taxes paid under protest.

* * * * * * *

"§ 5139. The action may be brought only:

"(a) As to portion of the assessment claimed to be void.

"(b) On the grounds specified in the protest.

"(c) By the owner, his guardian, executor, or administrator.

* * * * * * *

"§ 5141. If the court finds that the assessment complained of is void in whole or in part, it shall render judgment for the plaintiff for the amount of the taxes paid on so much of the assessment as is found to be void. In such event but only where taxes are paid after the effective date of this act, the plaintiff is entitled to interest on the taxes for which recovery is

allowed at the rate of 5 per centum per annum from the date of payment under protest to the date of entry of judgment, and such accrued interest shall be included in the judgment. The taxes paid on so much of the assessment as is not found to be void shall constitute valid taxes which, if paid after delinquency, shall carry penalties, interest and costs."

Deering's Revenue and Taxation Code of California, 1944 edition, pp. 217, 218 and 219.